



1     **II.    BACKGROUND**

2           Plaintiff filed his Complaint in the Superior Court of  
3     California, alleging breach of written contract and breach of  
4     fiduciary duties and seeking \$2 million in damages. Notice of  
5     Removal, Docket No. 1, Ex. A ("Compl."). UBS subsequently removed  
6     the action to this Court. Id.

7           Plaintiff apparently had significant experience with the  
8     mining industry and worked in some capacity as a consultant for  
9     the mining division at UBS. Opp'n at 2. The present action arose  
10    out of two letters exchanged between UBS and Plaintiff in October  
11    and November of 1997. Compl. Ex. A. Plaintiff, in essence,  
12    asserts that these letters created a binding contract whereby UBS  
13    agreed to pay Plaintiff an undetermined sum if UBS were to use  
14    Plaintiff's services for various transactions. In particular,  
15    Plaintiff alleges that UBS agreed to pay him a fee should UBS  
16    transact with a company called Thomson Creek. Id. The relevant  
17    language from UBS's letter to Plaintiff states:

18                   We and you should seek to identify and  
19                   agree, as early as practicable,  
20                   situations that might qualify for  
21                   additional payments and estimate the  
22                   approximate additional amount. Each such  
23                   situation will be sui generis (we shall  
24                   often not know at the outset of a mandate  
25                   how we shall ultimately earn our revenue)  
26                   and will reflect, mainly, success fees  
27                   and relative contribution. We can go  
28                   through some illustrative examples of how  
                    this might work in relation to advisory  
                    and equity business. We have already  
                    identified and need to agree on an  
                    estimate of additional payments that  
                    could be due to you in respect of  
                    possible transactions on behalf of Amax  
                    Gold and Thompson Creek.

27    Id.

1 According to Plaintiff's Opposition (but not his Complaint),  
2 UBS, subsequent to this letter, was involved in a transaction  
3 relating to Amax Gold. Opp'n at 4. According to the Opposition,  
4 Plaintiff received a fee from this transaction. Id. Plaintiff  
5 does not specify when this transaction occurred, what services he  
6 performed, or how a fee agreement was reached. In his Complaint,  
7 Plaintiff alleges that in 2006, UBS completed a transaction  
8 involving Thomson Creek. Plaintiff, based on the above-cited  
9 letter, requested a fee from UBS for this transaction. When UBS  
10 refused, Plaintiff sued in state court, seeking damages of \$2  
11 million. Plaintiff, in his Opposition, provides a concise  
12 statement of his claim: "Plaintiff's claim is simple and plainly  
13 stated: He had a written agreement (attached to the complaint)  
14 that obligated defendant to pay him a fee if defendant engaged in  
15 a transaction involving Thomson Creek. Defendant did engage in  
16 such a transaction and failed to pay plaintiff, to his damage."  
17 Opp'n at 2.

### 18 19 **III. LEGAL STANDARD**

20 A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss  
21 tests the sufficiency of the complaint. Dismissal pursuant to  
22 Rule 12(b)(6) is appropriate if the plaintiff is unable to  
23 articulate "enough facts to state a claim to relief that is  
24 plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct.

1955, 1974 (2007)).<sup>2</sup> For purposes of such a motion, the complaint is construed in the light most favorable to the plaintiff and all properly pleaded factual allegations are taken as true. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); Everest & Jennings, Inc. v. Am. Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994). All reasonable inferences are to be drawn in favor of the plaintiff. Id. Unreasonable inferences or conclusory legal allegations cast in the form of factual allegations, however, are insufficient to defeat a motion to dismiss. W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Finally, "[i]n determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss."

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<sup>2</sup> In its Reply, UBS makes much of the fact that Plaintiff did not cite Twombly in the legal standard section of his Opposition. UBS states:

Plaintiff premises his opposition on the assertion that a claim can survive a motion to dismiss under . . . 12(b)(6) unless "it is beyond a doubt that the plaintiff can prove no set of facts in support of the claim which would entitle relief." (Opp'n at 1) [citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)]. But plaintiff is wrong: the Supreme Court expressly overruled the precise pleading standard on which plaintiff's brief is predicated in last year's decision in Twombly. Plaintiff ignores Twombly and instead relies on the overruled "no set of facts" dismissal standard of Conley . . .

Reply at 3. UBS would have been well advised to pay this attention to its own Motion. In the second sentence of its legal standard, it quotes the very language from Conley that was overruled by Twombly and that provoked UBS's criticism of Plaintiff. Mot. at 5. Moreover, nowhere in the legal standard of UBS's Motion does it even acknowledge Twombly. Id.

Schneider v. Cal. Dept. of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (emphasis in original).

#### IV. DISCUSSION

Plaintiff has failed to allege the necessary facts to state a claim for relief under a theory of breach of contract or breach of fiduciary duty.

##### A. Breach of Contract

"A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." Careau & Co. v. Sec. Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1388 (Ct. App. 1990).

Ordinarily, a written contract is sufficiently pleaded if it is set out in full or its terms alleged to their legal effect. But if the instrument is ambiguous, the pleader must allege the meaning he ascribes to it. Where a written contract is pleaded by attachment to and incorporation in a complaint, and where the complaint fails to allege that the terms of the contract have any special meaning, a court will construe the language of the contract on its face to determine whether, as a matter of law, the contract is sufficient to sustain a cause of action for breach.

Beck v. Am. Health Group Int'l, Inc., 211 Cal. App. 3d 1555, 1561 (Ct. App. 1989) (internal quotation marks, citations, and alterations omitted). Under these circumstances, where the interpretation of the contract does not turn on the credibility of

1 extrinsic evidence, it is "solely a judicial function to interpret  
2 a written instrument." Id. (internal quotation marks omitted).

3 In the present case, Plaintiff's Complaint "merely  
4 incorporated a copy of the attached writing by reference, leaving  
5 it to speak for itself." Id. at 1562. The Court must therefore  
6 construe the language and determine whether the writing  
7 constitutes a contract. See id.

8 "Whether a writing constitutes a final agreement or merely an  
9 agreement to make an agreement depends primarily upon the  
10 intention of the parties." Smissaert v. Chiodo, 163 Cal. App. 2d  
11 827, 830 (Ct. App. 1958). "In the absence of ambiguity this must  
12 be determined by a construction of the instrument taken as a  
13 whole." Id. "The intent of the parties is to be determined by an  
14 objective standard and not by the unexpressed state of mind of the  
15 parties." Id. "Where any of the terms are left for future  
16 determination . . . there is no binding contract until this is  
17 done." Id. at 830-31. "The objective intent as evidenced by the  
18 words of the instrument, not the parties' subjective intent,  
19 governs our interpretation." Beck, 211 Cal. App. 3d at 1562.

20 The very first sentence of the relevant paragraph in UBS's  
21 letter indicates that there was no binding contract. The sentence  
22 states: "We and you should seek to identify and agree, as early as  
23 practicable, situations that might qualify for additional payments  
24 and estimate the approximate additional amount." Compl. Ex. A.  
25 The final sentence of this paragraph is equally instructive: "We  
26 have already identified and need to agree on an estimate of  
27 additional payments that could be due to you in respect of  
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possible transactions on behalf of Amax Gold and Thompson Creek." Id. Both sentences explicitly reference the need to agree, at some point in the future, on payment amounts for transactions that, at the time of the letter, were still mere possibilities. "Where . . . there has been no agreement upon an essential element and the contract provides no means for the determination thereof but leaves it to the future negotiation and agreement of the parties, the contract is void." Avalon Prod. v. Lentini, 98 Cal. App. 2d 177, 180 (Ct. App. 1950).

Given the language of the alleged contract, it appears that "the letter did not constitute a binding contract, but was merely 'an agreement to agree' which cannot be made the basis of a cause of action." Beck, 211 Cal. App. 3d at 1563. Plaintiff has failed to allege "enough facts to state a claim to relief that is plausible on its face" for breach of contract. Twombly, 127 S. Ct. at 1974. Plaintiff's breach of contract claim is therefore DISMISSED without prejudice.

**B. Breach of Fiduciary Duties**

"[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." Comm. on Children's Television, Inc. v. Gen. Foods Corp., 35 Cal. 3d 197, 221 (1983) (superceded on other grounds by statute, as recognized in Californians For Disability Rights v. Mervyn's, LLC, 39 Cal. 4th 223, 228 (2006)). "Although parties may create fiduciary relationships by contract, mere contractual relationships, without

1 more, do not give rise to fiduciary relationships." Sonoma Foods,  
2 Inc. v. Sonoma Cheese Factory, LLC, No. C 07-00554 JSW, 2007 WL  
3 2122638, at \*9 (N.D. Cal. July 23, 2007) (internal quotation marks  
4 and alterations omitted).

5 Plaintiff has plead no facts that would indicate that UBS  
6 agreed in the alleged contract at issue to undertake a fiduciary  
7 relationship and give priority to the interests of Plaintiff. The  
8 Court therefore GRANTS UBS's Motion and DISMISSES without  
9 prejudice Plaintiff's claim for breach of fiduciary duty.

10  
11 **V. CONCLUSION**

12 For the foregoing reasons, Defendant's Motion is GRANTED and  
13 Plaintiff's action is DISMISSED without prejudice. Plaintiff is  
14 granted 30 days in which to file an amended complaint. If no  
15 amendment is filed within said period, the case will be dismissed  
16 with prejudice.

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19 IT IS SO ORDERED.

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21 Dated: July 10, 2008



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23 UNITED STATES DISTRICT JUDGE  
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